SUPREME COURT OF THE UNITED STATES.

No. ~~9~~ 7.

JAMES J. O'BRIEN, PLAINTIFF IN ERROR,

VERSUS

JAMES H. DAVIS.

IN ERROR TO THE DISTRICT COURT UNITED STATES FOR WESTERN DISTRICT OF PENNSYLVANIA.

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UNITED STATES OF AMERICA, } *sct.*
Western District of Pennsylvania, }

The President of the United States to the Judge of the western district of Virginia, holding court in the city of Pittsburg, in the western district of Pennsylvania, conformably to the provisions of the act of Congress approved the 20th day of May, 1826.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, between the lessee of James J. O'Brien, plaintiff, and James H. Davis, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears—

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all

things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and usages of the United States, should be done.

Witness the Honorable Alexander Caldwell, Judge of the western district of Virginia, this 26th day of January, A. D. 1829, and in the fifty-third year of the independence of the United States.

E. J. ROBERTS, *Clerk.*

The President of the United States of America to the Marshal of the western district of Pennsylvania, greeting.

Whereas James J. O'Brien hath this day sued out his writ of error to a certain judgment in ejectment, recovered against him on the nineteenth day of December, A. D. 1828, in the district court of the United States for the western district of Pennsylvania aforesaid, holden by the Judge of the western district of Virginia, in pursuance of the act of Congress approved the 20th day of May, 1824, by James H. Davis, defendant, against the lessee of the plaintiff, returnable in the Supreme Court of the United States on the second Monday of January next—these are, therefore, to command you that you make known to the said James H. Davis that he be and appear to the said writ of error in the said superior court, on the first day of the next term thereof, to hear an assignment of errors thereof; and hereof fail not at your peril; and how you shall have executed this writ of citation, make return to our clerk of our said western district of Pennsylvania, at Pittsburg, on the rule day of said court for the month of March next.

Witness the Honorable Alexander Caldwell, Judge of the United States' court for the western district of Virginia, this 26th day of January, A. D. 1829, and in the fifty-third year of the independence of the United States of America.

A. CALDWELL.

Served, by reading the original to James H. Davis, and giving him a copy. February 12th, 1829.

HUGH DAVIS, *M.*

Know all men by these presents, that we, Michael C. Conway and Patrick Doran, of the city of Pittsburg, in the Commonwealth of Pennsylvania, are held and firmly bound to James H. Davis, of the same city and Commonwealth, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said James H. Davis, his certain attorney, heirs, executors, administrators, or assigns: to which payment well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, and every of them, firmly by these presents.

Witness our hands and seals, the nineteenth day of January, in the year of our Lord one thousand eight hundred and twenty-nine.

The condition of the above obligation is such, that whereas the defendant, James H. Davis, recovered a judgment in ejectment against the lessee of James J. O'Brien, in the district court of the United States for the western district of Pennsylvania, for which judgment the said plaintiff hath obtained a writ of error to the Supreme Court of the United States, returnable in said

court on the second Monday of January next: now, if the said lessee of O'Brien, plaintiff in the writ of error aforesaid, shall prosecute his said writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, otherwise of full force and effect.

In testimony whereof, the said Michael C. Conway and Patrick Doran have hereunto set their hands and seals, the day and year above written.

his
MICHAEL + CONWAY, [L. S.]
mark.
PATRICK DORAN, [L. S.]

Test.
E. J. ROBERTS.

Approved.
A. CALDWELL,
Judge of the United States' court
western district of Virginia.

I certify the foregoing to be a true and faithful copy of the original, as filed in the office of the clerk of the district court of the United States for the western district of Pennsylvania.

E. J. ROBERTS, *Clerk.*

In the district court of the United States in and for the western district of Pennsylvania.—May term, 1825.

Richard Smith, a citizen of the State of Indiana, lessee of James J. O'Brien, a citizen of the same State,	Ejectment for a certain part of lot No. 394, situate in the city of Pittsburg. April 22, 1825.
vs.	
William Stiles, a citizen of the State of Pennsylvania, with notice to James Davis, tenant.	Returned "served." H. Davis, Marshal.

In the district court of the United States, in and for the western district of Pennsylvania, May sessions, 1825.

PENNSYLVANIA, WESTERN DISTRICT, sct.

James H. Davis, late of the district of Pennsylvania, yeoman, a citizen of the State of Pennsylvania, was attached to answer Richard Smith, a citizen of the State of Indiana, of a plea, wherefore with force and arms he entered into one messuage and lot of ground situate in the city of Pittsburg, being a part of lot No. 394 in said city, with the appurtenances, and being in Alleghany county, in the district aforesaid, which James J. O'Brien, a citizen of the State of Indiana, had demised to the said Richard Smith for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the United States. And whereupon the said Richard, by S. Kingston, his attorney, complains, that, whereas the said James J. O'Brien, on the first day of January, in the year of our Lord one thousand eight hundred and twenty-five, at the district aforesaid, had demised to the said Richard the tenements aforesaid, with the appurtenances, to have and to hold the same to the said Richard and his assigns, from the day next immediately preceding the day aforesaid, for and during and unto the full end and term of ten years then next ensuing, and fully to be complete and ended; by virtue of which said demise, the said Richard entered into the said tenements, with the appurtenances, and was thereof possessed: and the said Richard being so

thereof possessed, the said James afterwards, to wit, on the same day and year aforesaid, with force and arms, &c., entered into the said tenements, with the appurtenances, which the said James J. O'Brien demised to the said Richard, in form aforesaid, for the term aforesaid, which is not yet expired, and ejected him out of his said farm, and other wrongs to him did, to the great damage and against the peace of the United States: whereupon the said Richard saith he is injured, and hath sustained damage to the value of one thousand dollars; and thereupon he brings suit.

JOHN DOE, } *Pledges to*
RICHARD ROE, } *prosecute.*

To James Davis, a citizen of the western district of the State of Pennsylvania, resident in Alleghany county, tenant in possession of the premises, or some part thereof:

I am informed that you are in possession of, or claim title to the premises in this declaration of ejectment mentioned, or to some part thereof; and I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear at the next May session of the district court of the United States for the western district of Pennsylvania, by some attorney of that court, and then and there by a rule of the same court to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be rendered against me by default, and you will be turned out of possession.

Your loving friend,
WILLIAM STILES.

In the district court of the United States, western district of Pennsylvania.—May term, 1825.

No. 32.

Richard Smith, a citizen of the State of Indiana, lessee of James O'Brien, a citizen of the same State,
vs.
William Stiles, a citizen of the State of Pennsylvania, with notice to James Davis, the tenant in possession.
} Ejectment. Returned "served."

1825, May 2d. Rule on the tenant in possession to appear and enter into the common rule within six weeks, or judgment against the casual ejector in open court.

Copy from the record. W. WALKER, *Clerk.*

To the defendants above named, or their attorneys.

Take notice that a rule to plead as above stated has been entered in the above causes, and you are hereby required to act accordingly.

W. W. FETTERMAN,
Plaintiff's attorney.

July 11, 1825.

Rule to appear and plead. Notice given to me by the marshal—d. b. e.
R. BIDDLE.

Served July 15, 1825.

HUGH DAVIS.
M. FETTERMAN.

1825, October 19th, Continued. 17th October, 1826, Ordered on the special court list. 1827, May 9th, Mr. Biddle appears, and enters into the common consent rule, and pleads not guilty.

1827, October 22d, Jury sworn. 25th, Juror withdrawn by consent of attorneys, and case continued.

1828, October 25th, Continued to be tried on the 3d Monday of December next.

December 15th, Trial of this cause begun before Judge Caldwell of district court of the United States for the western district of Virginia; and on the 19th of December, verdict for the *defendant*, judgment.

1829, January 28th, Removed by citation to the Supreme Court of the United States, and bond filed, as approved by Judge Caldwell.

UNITED STATES,
Western District of Pennsylvania, } *sct.*

I, Edward J. Roberts, clerk of the district court of the United States for the district aforesaid, do hereby certify that the foregoing contains a true copy of the docket entries, and of the papers filed of record in the office of the clerk of the district court of the United States for the western district of Pennsylvania, in the case of the lessee of James J. O'Brien *vs.* James Davis, being No. 32 of May term, 1825.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court, at Pittsburg, the 28th day of January, A. D. 1829, and of the independence of the United States the fifty-third.

E. J. ROBERTS, *Clerk.*

LESSEE OF O'BRIEN, *vs.* DAVIS. } *In the district court for western district of Pennsylvania.*

In this case the court are requested to charge the jury,

1st. That, if the jury believe that any agreement was made between Thomas Jones and Joseph Davis to give time to the latter to pay the amount of the judgment, the five years did not begin to run till expiration of the credit agreed on.

2d. That the suing out of the scire facias to January term, 1814, prevented the operation of the statute as to judgments and mortgages subsequent to the scire facias, to wit, in August, 1816, and February, 1818.

3d. That act 4th April, 1798, does not apply between judgment and judgment, but extends only to cases of purchasers; and that it applies in no case in favor of any persons who acquire a lien on the property during the pendency of a scire facias.

4th. That the sheriff's sale on the judgment of Banks and Elliot did not preclude Jones from proceding to a sale on his judgment.

5th. That plaintiffs in this ejectment have a right to recover notwithstanding the sale and proceedings under the judgment of Banks and Elliot.

6th. That the proceedings under Jones's judgment, as to the validity of the title acquired thereby, cannot be affected by the want of a scire facias within five years from its date, or the expiration of the credit agreed on, inasmuch as an application was made to the court of common pleas to set aside the execution of Jones on the ground of the want of a scire facias within five years, which motion was overruled by that court, who were the competent and only judges of the validity and regularity of their own process,

and also of the necessity of taking out a scire facias within five years, under the circumstances of the case before them.

7th. That the validity of the proceedings in Jones's judgment cannot, under the circumstances of this case, be inquired into collaterally in this action.

8th. That after the affirmance in the Supreme Court of the judgment of Jones *vs.* Davis, no inquiry can be had into the regularity of any of the proceedings under it.

HENRY BALDWIN,
Attorney for plaintiff.

In the district court of the United States in and for the western district of Pennsylvania.

No. 32.

LESSEE OF O'BRIEN, *vs.* JAMES H. DAVIS. } *Ejectment.*

In the above case the jury were charged by Judge Caldwell, of the western district of Virginia, who tried the cause under the act of Congress of the 20th May, 1826, the district attorney of the western district of Pennsylvania having been of counsel for the defendant, in an action involving the same claim as is involved in this suit, previous to his appointment as judge.

LESSEE OF O'BRIEN *vs.* DAVIS AND OTHERS.

GENTLEMEN OF THE JURY: The ejectment in this case is founded upon the title of O'Brien; and, to entitle the plaintiff to your verdict, it should appear to your satisfaction that that is the superior title. The history of that title is this:

On the 10th day of August, 1805, Jones, O'Brien's testator, recovered a judgment in the court of common pleas against Joseph Davis for $1,540. Upon that judgment no execution or scire facias was sued out within five years from the rendition thereof; but to January term, 1814, a scire facias was issued and returned; and in the year 1820 Jones obtained a judgment reviving his former demand, and in the same year took out a fi. fa., which was levied on the house and lot, the subject of this ejectment. To December term, 1820, the defendant Davis obtained a rule upon the plaintiff to show cause why his fi. fa. should not be set aside. This rule was subsequently discharged, whereupon Davis sued out a writ of error from the Supreme Court to the original judgment, and upon trial that judgment was affirmed. All obstacles to the prosecution of the plaintiff's execution having been thus removed, the sheriff, upon a writ of venditioni exponas, made sale of the lot formerly levied on; O'Brien became the purchaser, and on the 20th of April, 1824, he obtained a deed from the sheriff. Thus far O'Brien's title seemed unexceptionable; and if the question of title yet remained between the original parties to the judgment or their representation, the plaintiff's claim to the possession of the lot could not be controverted; for although the plaintiff, by permitting his judgment to lie dormant for a longer period than five years, may have lost the lien enacted by the judgment, yet, upon the revival of that judgment in the court of common pleas, his right to satisfaction out of the debtor's estate was reserved. But as claims of other

creditors may have intervened after the expiration of five years, and during the pendency of the scire facias, the important question occurs, whether the judgment of revival has relation back to the date of the original judgment, so as to overreach the rights of mean purchasers or judgment creditors. Conformably to the laws of Pennsylvania previous to the passage of the act of April, 1798, this would doubtless have been the result. Does it still remain so as to judgment creditors, notwithstanding that act? This question brings into view the construction to be given to the act. The preamble reads thus: "Whereas the provision heretofore made by law for preventing the risk and inconvenience of purchasers of real estate, by suffering judgment to remain a lien for an indifferent length of time, therefore be it enacted," &c. The second section provides that no judgment hereafter entered in any county record within this Commonwealth shall continue a lien on the real estate of the person against whom such judgment may be entered during a longer time than five years, unless the plaintiff shall, within the said five years, sue out a scire facias to revive the same.

The plaintiff's counsel contend that this act was intended to protect purchasers of real estate only, and does not apply to judgment creditors, but leaves the law, in respect to them, as it stood before the passage of the act.

In support of this position, the preamble of the act, and the construction given to it by the circuit court of the United States in the case Hurst *vs.* Haws (3d Binney) are relied on; and it is agreed that in the construction of legislative enactments, the intention of the makers of the law ought to be regarded, and, as a key to that intention, the U. S. act is properly had to the preamble of the act. This is true, especially when the provisions of the act are in conflict or ambiguous. Yet it does not follow that the preamble shall control the enactment of the statute, so as to render inoperative all provisions which embrace other objects, and are designed to correct other evils than those specified in the preamble.

Whether the legislature, by the act of April, 1798, had it in contemplation to go farther than to correct the mischiefs enumerated in the preamble, is not free from doubt; and the circuit court of the United States, in the case referred to, was of opinion that the act applies to purchasers of real estate only, and does not extend to the relief of judgment creditors. That decision was made in the year 1807; and it is cited as authority to, and obligatory upon, this court. This is not admitted. The judgment and decisions of the Supreme Court of the United States, and the adjudication of the State courts upon their own statutes, (when the latter do not come in conflict with the laws of Congress,) are regarded as authority, and conclusive upon this court. The decisions of the circuit court, although held in high estimation, are not viewed in that light.

The inquiry then is, how the courts of Pennsylvania passed upon and settled the construction to be given to the act of April, 1798: so far as this has been done, their decision will be viewed as law to this court.

In the case of the Bank of North America against Fitzsimmons, (3d Binney,) decided in 1811, the Supreme Court of Pennsylvania say that a judgment not renewed by scire facias within five years from its date ceases to be a lien on real estate, as well against subsequent judgment creditors as against purchasers; and in the recent case of Pennock *vs.* Heart, (11 Sergeant and Rawle,) the same court say it is settled that a judgment creditor can avail himself of the lien wherever the land could be discharged in the hands of a purchaser.

These cases, gentlemen, settled the interpretation which the act of April, 1798, was thenceafter to receive in the courts of this State; and having been acquiesced in, and become a rule of property important to the citizens, they ought not lightly to be disturbed.

I have said, gentlemen, that the decisions of the State courts upon their own statutes are always received in the courts of the Union as the true construction thereof.

This is apparent from a variety of cases, some of which I shall refer to.

1st. The case of McKean *vs.* Delancer's lessee, reported in 5th Cranch. Upon the trial of that case in the circuit court of the United States sitting in Philadelphia, the plaintiff offered in evidence the exemplification of a deed to himself, which had been admitted to record. The court were divided in opinion as to its admissibility, and the disagreement of the judges was certified to the Supreme Court of the United States. The only question in the latter court was whether the deeds to the plaintiff had been properly proved and regularly admitted to record, conformably to the laws of Pennsylvania. The courts of this State had, in other cases, decided that deeds similarly proven had been properly admitted to record. Chief Justice Marshall, in delivering the opinion of the court, said, were the act which provides for recording of deeds now for the first time to be construed, the opinion of this court would certainly be that the deed was not regularly proven. But in construing the statutes of a State, on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has long been established in the State; and as the State courts have put a construction upon this act, this court yields the interpretation it otherwise would put upon it. In the cases of Pollock, lessee, *vs.* Wendall, (9th Cranch,) Thatchel *vs.* Powell, (6th Wheaton,) and Shilly *vs.* Gray, (11th Wheaton,) the court say that they will adopt and be governed by the construction given by the State courts of State statutes, when that is settled and ascertained, especially when titles to land are in question. These, as well as other cases of like import, were received and confirmed by the same court in the case of Jackson *ys.* Char, (12th Wheaton's Reports.)

Hence it results that the courts of the United States, when called on to interpret the State statutes, will be governed by the construction they have received in the State courts. But the circuit court, in the case before referred to, of Hurst *vs.* Haws, having given a construction to the act of April, 1798, before it had undergone an adjudication in the courts of the State, that the construction of plaintiff's counsel should be adhered to in preference to the construction since given to the act by the State tribunals. Not viewing the decision of the circuit court as obligatory upon this court; not being convinced that it was clearly correct, and entertaining no doubt that mischief to a much greater extent would follow the adoption of that construction than can possibly flow from that of the Supreme Court of the State, I am inclined to concur with the latter court. Besides, were the respective courts to construe the act of April, 1798, adversely, the land titles depending thereon would rest, not upon uniform principles of law, applicable to and governing all cases coming within the provision of the act, but would depend upon the court in which suit should be brought: if in the federal court, the decision would be for the plaintiff; if in the State court, judgment would be for the defendant. Such a state of things would produce an anomaly in judicial proceedings, greatly to be deprecated. Uniformity of laws regulating land titles

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especially was more important to the public than their abstract justice. The act of April, 1798, is positive in the declaration that no judgment shall continue a lien upon real estate for a longer period than five years, unless revived by scire facias: nevertheless, it cannot have been intended by the legislature to do more than to establish a general rule, subject to such exceptions as acts had or hereafter should establish. Numerous are the instances in which a scire facias may not issue until after the lapse of five years from the date of the judgment, and yet the lien of the judgment be pursued. Some such have been cited in argument: 1st. The entry on the record of lessit executio; 2d. Delay of execution by writ of error, or the award of an injunction; 3d. Time given by agreement of the parties. In all these, and other cases of like character, the lien is pursued by the issue of a fi. fa. within five years from the removal of the cause which prevented the issue of process upon the rendition of the judgment.

It is not pretended that in this case any of the exception applies to that created by the agreement between Jones and Davis, and proven by Samuel Kingston, Esq., who states, in substance, that in the autumn of 1809 he was present during a conversation between Jones and Davis respecting the judgment in question. Davis said to Jones, I have made you considerable payments; I hope you will indulge me for the balance. Jones acknowledged that good payments had been made, and said that he did not want money, and, at any rate, would not oppress an old friend; that he would not oppress him, or put him to costs shortly. Before this conversation a payment had been made by Jones.

It is undoubtedly the law that the issue of process upon a judgment may be stayed by agreement of the parties, and is binding on themselves, although not entered of record. But it must be definite in its terms, and for a valuable consideration, otherwise the plaintiff's hands are not tied up. What length of time was Jones to indulge Davis? Was it a year or a month? As to this we are in the dark; and for that reason the promise was too indefinite to be carried into execution, nor would it have prevented the plaintiff from suing out execution the next day.

But if the promise had been certain as to time, it would have been void for the want of a consideration to support it. It does not appear that any money was then paid or offered to be paid, on condition that Jones would give time. The parties conversing respecting payments which had been previously made, Davis said, I have made you considerable payments, I trust you will not press me for the balance; nay, said Jones, I will not press you or put you to costs. There was therefore clearly no consideration for the promise, and no contract or promise is binding unless it be founded on either a good or a valuable consideration, present or in prospect. Yet if the terms of Jones's promise had been certain as to time, rested on a valuable consideration, and been obligatory between the parties, did it tend to preserve the lien against other judgment creditors of Davis, after the lapse of five years from the date of the judgment? It was contended at the bar that it did; and the case Dunlap's lessee *vs.* Speer, (3d Binney,) and Mitchell *vs.* Chew, (Burson, 610,) were cited. Both those cases arose upon creditors between the original parties to the judgments, and establish the law to be that if a plaintiff is prevented from taking out execution upon his judgment within the time prescribed by law, in consequence of an agreement with the de-

tendant, he shall nevertheless have execution without being compelled to resort to a scire facias.

But if the agreement or private arrangement be not entered of record, are purchasers or judgment creditors affected by it? The case of Black *vs.* Dobson, executor of Dobson, (Sergeant and Rawle's reports,) is conclusive on this point. The debtor in that case executed a warrant of attorney to confess judgment, which provided for a stay of execution one year: judgment was entered, warrant filed, but no notice taken on the record of stay of execution; plaintiff sued out execution before the lapse of five years from the expiration of the stay of the execution, specified in the warrant, but after the five years, computing from the date of the judgment. The court decided that the plaintiff had lost the lien of his judgment upon the estate of Dobson, so far as he came in conflict with the purchasers or judgment creditors. According to this decision, no contract or agreement for stay of execution, not entered of record, will continue the lien of a judgment against creditors for a longer period than five years, unless revived by scire facias or other process; consequently, had the agreement deposed to by Mr. Kingston been made upon a legal consideration, reduced to writing, but not entered of record, it would not have preserved the lien of the judgment beyond five years, against purchasers or judgment creditors.

It has been further contended, on the part of the plaintiff, that the issue of the scire facias upon Jones's judgment was notice to the world of the existence of the debt, and that plaintiff designed to preserve the lien of his judgment. The cases referred to in support of this position go upon the ground either that the scire facias was sued out during the existence of the lien, or that the question respected the parties to the original judgment only, and are therefore not applicable to the present case. If a plaintiff has permitted the lien of his judgment to expire, and has not issued a scire facias until after the expiration of five years, and then prosecutes it, I know of no decision, nor of the establishment of any principle, either by the courts of Great Britain or of this country, which will overreach the right of purchasers or judgment creditors, acquired during the pendency of such scire facias; nor is such purchaser or judgment creditor, as has been argued, in the light of a purchaser pendente lite, upon a suit instituted for the recovery of specific property, or for the enforcement of a specific lien, the furtherance of justice, the principles of equity, and the desire to suppress the multiplication of suits, while to restrain a defendant from selling or incumbering the property during the progress of the suit. If this were not the case, the defendant might sell the estate, the subject of the suit; and should the purchaser be thereupon made a party, he might, in like manner, transfer the title to some other person, and so on, to the great delay of the plaintiff, and in abuse of the process of the court. But if the time has elapsed within which a scire facias upon a judgment may lawfully issue, and it be subsequently issued, what notice does it afford? It is not notice that the plaintiff has a subsisting lien, which he means to enforce; not notice that he has a claim to any specific property possessed by the defendant, but refers to a judgment formally rendered in his favor, which, upon examination, is found to have lost its lien as respects purchasers and judgment creditors.

The object of the legislature, in their enactments of April, 1798, was to remove the restraints which then existed to the voluntary sale and transfer of real estate, and, agreeably to the decision of the courts of this State, to

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sales upon judgments also. Yet this intention would be defeated if a plaintiff could, by the issue of a scire facias after the expiration of five years from the date of his judgment, reinstate the lien.

A scire facias issued within five years is a process by virtue of the statute of April, 1798; if after that period, it becomes a proceeding at common law, and is in the nature of an original action, pleadable to either, in bar or in abatement. The scire facias which issued upon Jones's judgment is of the latter character, and did not, during its pendency, protect the defendant's estate from other judgment creditors. In this respect it was of no greater efficacy than would have belonged to an action of debt upon the judgment. By the lapse of time, the lien and legal operation of the judgment was gone at the date of the scire facias. At common law, a judgment constitutes a lien on the real estate of the debtor which subsists for a year and a day. If the plaintiff suffers that time to expire, and afterwards proceeds by scire facias, other creditors, who have obtained judgments against the same defendant during the pendency of the scire facias, may levy on, by various writs of elegit, the whole of the defendant's estate, to the entire exclusion of the plaintiff in the first judgment.

The decision of the court of common pleas upon the motion of John Davis to set aside the execution Jones had sued out upon his judgment of 1820, and the affirmance of that decision in the appellate court, are viewed by plaintiff's counsel as deciding the legality of that execution, and that it is not competent for this court to inquire into the propriety of that decision. This court does not claim that it has power to review the propriety of that decision, nor to correct it if it should be deemed erroneous.

That decision left each of the parties to pursue his judgment as he should deem most likely to promote his interest; and Jones's executors having brought his action in this court, it necessarily imposes on us the duty of deciding upon the case made by evidence. His original judgment, scire facias, and subsequent proceedings, are all before us; and notwithstanding the refusal of the court of common pleas to set aside Jones's execution, the title which Jones acquired upon the sale of Davis's property is open for our examination. There remains one other point made by the counsel, of which it may be requisite some notice should be taken; that is to say, that a sale of land made by a sheriff under a junior judgment does not pass the title to the prejudice of a prior judgment creditor, and that the lien of the prior judgment still continues, notwithstanding such sale. As to this point, in my opinion, both upon principle and authority, the law admits of but little doubt.

It is clear that upon these principles, the first lien is entitled to the first satisfaction out of the debtor's estate.

A judgment binds the real estate of the debtor, and vests in the plaintiff a right to satisfaction, paramount to the claims of all subsequent creditors, and of this right he cannot be deprived by process upon a judgment to which he is neither party nor privy. A fi. fa. issued within the time prescribed by law has relation to the date of the judgment, and imposes the officer to levy upon the estate of the debtor which he was possessed of at that time. If the law were adjudged otherwise, this absurdity would seem to follow—the first judgment creates the first lien, the prior right over the debtor's estate, yet of that right the plaintiff can be legally deprived by process upon a judgment confessedly posterior to his, and the control of his lien, in opposition

to his wishes, would be in the power of a stranger. It would seem more reasonable that the first lien should be first satisfied, and that the plaintiff should be compelled to abide by a sale of the lands of his debtor, made upon a junior judgment, of which he may have had no notice, and commence a scramble in court for the proceeds. Upon authority, too, this would appear to be the law. In the case of Feild *vs.* Holland, (6th Cranch,) and Rankin *vs.* Strackald and Scott, (12th Wheaton,) a similar question came up. The case first mentioned was as follows: In the year 1793, Holland recovered a judgment in a court of Georgia against Cox, for a large sum of money; in 1794, Cox sold and conveyed a tract of land to Feild; in 1799, Holland issued an execution upon his judgment, the lien being still in force, and the same land which had been sold to Field was sold by the sheriff, and Holland became the purchaser. The Supreme Court of the United States decided that the legal title passed by the latter sale, notwithstanding that Cox had, some years before, conveyed the land to Feild. The case from 12th Wheaton is more in point with the present case; it was from Missouri, and depended upon a clause in the statute of that State defining the duration of liens upon real estate after judgment; which clause contains a provision similar to the second section of the act of this State of April, 1798, and declares that no judgment entered in the courts of Missouri shall continue a lien upon the lands of the defendant for a longer time than five years from the return day of the term at which judgment may be entered, unless the same be renewed by scire facias. Two judgments, at different times, had been rendered against one Little. The plaintiff in the latter judgment sued out the first execution, and the sheriff sold and conveyed a house and lot in St. Louis to Scott; shortly after that sale, an execution was issued upon the first judgment, and the same property was levied on, and sold a second time, and the purchaser got possession. Scott, the purchaser at the first sale upon the junior judgment, brought an ejectment to recover the possession, and the court of Missouri decided in his favor; upon a writ of error in the Supreme Court of the United States, the judgment was reversed. The Chief Justice, in delivering the opinion of the court, says: By the law of Missouri, judgments are to be a lien upon the lands of the debtor. This lien commences with the judgment, and continues five years. The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claim out.

The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into execution, has never been considered such an act. If, therefore, in the opinion of that enlightened court upon a question arising on the statute of Missouri, which is almost word for word with the act of April, 1798, of this State, the circumstance that the holder of the prior lien had not proceeded upon it until a subsequent lien had been obtained and carried into execution, did not deprive him of his lien, nor prevent the title from passing by second sale. Why should a plaintiff similarly circumstanced be prevented from selling under the act of April, 1798? and why should not a sale so made carry with it, in like manner, to the purchaser, the legal title? The case cited from 1st Peters is to the same effect. The court say that the lien is upon the thing itself, and not on the proceeds of a sale made upon another judgment; that a sheriff's sale of land upon a judgment confers on the purchaser the right which the debtor had in the

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land, subject to prior incumbrances; and if the prior incumbrancer wishes to enforce his prior lien, he must do it by process upon his own judgment, but cannot claim the money arising upon a sale made by virtue of a judgment to which he is not a party, neither in name nor in interest. The case of Gurney's executor against Alexander (14th Sergeant and Rawle,) is at variance with these decisions; yet, although it arose on a statute of this State, it cannot be received as authority paramount to those cases: 1st, because it is in violation of legal principles long established, and which were received as universally applicable to the right of adverse claimants under judgments; 2dly, because it is in opposition to repeated adjudications of the Supreme Court of the United States; and 3dly, because it is of recent occurrence, unsupported by other cases, and too fresh to have the credit of settling the law upon the important point to which it relates.

I have informed you, gentlemen, that the plaintiff testator, Jones, on recovering a judgment upon his scire facias, in 1820, obtained a renewed lien upon the estate of the debtor, Joseph Davis, but could not execute it to the prejudice of purchasers or judgment creditors, whose liens subscribed before that event. You will recollect that the sheriff's deed to O'Brien is dated the 20th April, 1824.

By operation of law, that deed, so far as purchasers and judgment creditors are concerned, relates back no further than to the date of the judgment of revival in 1820, and takes precedence of all subsequent liens and incumbrance upon Davis's property.

This state of the case imposes upon us the necessity of inquiring into the title under which the defendant claims the house and lot, the subject of this ejectment. He claims, first, in right of a judgment in the case of Hinks and Elliot *vs.* Joseph and John Davis. This judgment was rendered in August, 1816, with stay of execution one year. A fi. fa. was issued April, 1818, levy made upon the same house and lot, which was subsequently sold by the sheriff, and Baker and John Davis became the purchasers, and deed made to them May, 1829. Secondly, They claim under a mortgage from Joseph Davis to Barker and John Davis, dated the 24th February, 1818, and a release from Barker to John Davis of his interest under the sheriff's deed, and mortgage from Joseph Davis. No exception having been taken to the authority of these deeds of conveyance, they are deemed to be regular; and the title which they were competent to convey is now vested in John Davis, under whom the defendant is in possession. No facts, gentlemen, material to the decision of this cause, are in dispute between the parties. Their respective claims rest on record evidence, and involve the legal question, which of them has the better right to the property.

It will be recollected by you, gentlemen, and, bearing it in mind, you will have no difficulty in making up a verdict, that the judgment of Jones *vs.* Davis, under which the plaintiff claims, was rendered in 1805, but no execution or other process was sued out until January, 1814, and the judgment of revival was not obtained until 1820. You will likewise recollect, that the judgment of Hinks *vs.* Elliot, under which the defendant, J. H. Davis, in part claims, was obtained in 1816, and regularly followed up to a sale of property in 1819; that in 1818 Joseph Davis conveyed the same property, by mortgage, to Barker and John Davis, and that Barker released his right to John Davis.

It remains for me to say to you that the defendant holds the property for the recovery of which this action has been brought, discharged of the lien